DONE
4-20-61
FRED

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC. 9 1959
HAROLD B. WILLEY, Clerk

No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 33

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

By a letter from the Clerk of this Court dated December 1, 1959, the Solicitor General was requested to respond to three questions posed by the Court. The questions, and our responses to them, are as follows:

I

Question: Based on the record in this case, does the petitioner accept respondent's contention, elaborated in oral argument, that some of the vegetables which were received during the harvest season were, after freezing, first placed in bulk storage, and later taken out of bulk storage and packaged in consumer-sized packages during the same harvest season?

Although the petitioner has no reason to controvert respondents' assertion that some bulk-stored vegetables were repackaged during the harvest season, the record in this case does not disclose either the relevant circumstances or the extent of any in-seasonal repackaging that may have been done. As explained in our reply brief (pp. 12–15), the Government throughout has challenged only the exemption of the post-seasonal operations, and the status of the in-seasonal operations has never been put in issue. As a result, the stipulations,[1] the findings,[2] the district court's opinion,[3] the court of appeals' opinion,[4] and all the briefs in this case prior to the respondents' brief in this Court, were limited to the facts and status of the post-seasonal repackaging. The only mention of in-seasonal repackaging was in the incidental comments of two witnesses that sometimes, during a lapse in the flow of fresh vegetables, previously-frozen vegetables were withdrawn from storage and repackaged.[5] Not being in issue, however, the

[1] See, *e.g.*, Pretrial Order, R. 17: "After the end of the peak corn season the frozen bulk whole kernel corn is taken from cold storage * * * and packaged in consumer size packages." See also R. 17–18, 19, 25.

[2] R. 66: "The 1954 crop of frozen corn was repackaged after the active season from * * *. Bulk frozen carrots are repackaged after the active season during the month of December."

[3] R. 52: "The Government contends that: 1. The repackaging of the bulk frozen corn and carrots after the active season ends" is not exempt.

[4] R. 176: "The issue on appeal relates to the trial court's holding that the 'repackaging of bulk frozen corn and carrots after the active season ends'" is exempt.

[5] See R. 100 (quoted at Pet. Reply Br. 14, n. 15); R. 154.

point was never developed. Even if that testimony, though immaterial to any of the issues as then framed, were accepted as establishing the fact that some in-seasonal repackaging was done, it is obviously not a complete enough description of the extent and nature of the operations to permit a judgment of the effect of those operations on respondents' right to the exemptions during the harvest season.

II

> *Question:* If the petitioner concedes that such packaging from bulk storage into consumer-sized packages did take place during the harvest season, what is the petitioner's position as to the exemption of these operations under the statute and regulation in issue, and what is the legal or other basis for such position?

It has not heretofore been necessary for the Administrator to adopt an official position on this question. No attempt has been made to enjoin the use of the exemptions in those circumstances, but that is not equivalent to a ruling that there is no violation of the law. The Administrator has neither the personnel nor the appropriations with which to seek out and enjoin every possible violation of the statute, but must instead concentrate on what are thought to be the most important problems or those involving the clearest violations. In this case, for example, the widespread and growing practice in the frozen foods industry of storing frozen vegetables in bulk for repackaging after the season ends made it important to establish whether the overtime exemptions applied to the post-seasonal repackaging operations. The

action was not brought to determine whether on the particular facts of Oregon's operations there were activities engaged in during the active harvest season which made the exemptions unavailable even then, and the failure to challenge Oregon's right to the exemptions during the season in no way implies a "determination" that it was entitled to them. We will, however, in response to the Court's invitation, state our informal views on the question.

As stated in our reply brief (p. 14), the effect of in-seasonal repackaging might turn on a number of factors not developed in this record, such as the extent of the operations (whether merely incidental or a full-scale independent operation), the reasons for engaging in them (whether to utilize workers standing by to handle fresh produce the flow of which is temporarily interrupted, to dispose of some of the crop in order to alleviate over-crowding in the cold-storage rooms, to fill customer's orders, etc.), and the effect of the operations on the use of overtime (whether overtime is used specifically for the repackaging or whether the repackaging is done by workers who have to be kept on hand anyway and would otherwise be idle). In order to deal with the question, therefore, it will be necessary to assume certain facts which do not appear from the record. We will assume those which, from the sparse testimony available, seem most likely to have been the case here: namely, that Oregon repackages vegetables from bulk storage during the harvest season only when, for some reason, there is a temporary interruption in the flow of fresh vegetables and the workers, who must be kept

on duty in any event to handle the fresh vegetables when the flow is resumed, would otherwise be idle; that that repackaging does not cause the use of additional overtime; and that the repackaging then done is relatively insignificant in amount.

On those assumed facts, it is our informal view that that incidental repackaging during the season would not result in a loss of the exemptions. A contrary view would mean that the employer must either allow workers to stand idle or forego the exemptions altogether, a result hardly required by the purposes of the exemption. The controlling consideration in terms of the underlying policy of the statute is that the overtime is required by the seasonal pressures—*i.e.*, to have the workers on hand to handle the influx of fresh produce—and not in order to perform the repackaging; the repackaging is done only to avoid economic waste when the workers are momentarily idled. Those policy considerations afford a compelling reason for construing the statute so that the exemptions otherwise available for the primary activity of processing fresh produce is not defeated by the incidental use of temporarily idled workers for repackaging, and there are at least two possible bases for such a construction.

It can be said, first, that the incidental repackaging is so intimately related in time, space, and function to the primary activity being carried on—the processing of fresh vegetables—as to be an inseparable part of a single integrated operation all of which constitutes "first processing." The time lapse between the freezing and storing and the later repackaging is

only a matter of hours; the repackaging is done by employees then engaged primarily in processing fresh vegetables; and the repackaging is integrated with the initial processing operations in the sense that it is done only to keep the production lines busy during a lapse in the flow of fresh vegetables. At least in terms of economics, moreover, such repackaging is a "necessary" part of the overall operation of the plant during the harvest season, since it is necessary for an economic utilization of the work force kept on hand to handle the incoming flow of fresh vegetables. For those reasons, the storage of some of the vegetables for a few hours before their final packaging can properly be viewed as being, not a "break" in the processing operations, but simply a part of the mechanics of achieving an efficient utilization of the production line—*i.e.*, with some vegetables being set aside momentarily when the production lines are overloaded and being returned when there is a lull in the intake of fresh vegetables. So viewed, the final packaging can be said to be a part of a "continuous series of operations" beginning with the fresh vegetables and hence a part of their "first processing" within the meaning of the regulations (see Pet. Br. 22). It may be that the difference between in-seasonal and post-seasonal repackaging in this respect is only one of degree (though there is also the difference that during the season initial processing and freezing is being simultaneously carried on), but even so it is a very real difference. More fundamentally, the scope of "first processing" cannot be determined by mechanical tests but requires a pragmatic judgment of the

relationship of the several steps to each other in the light of the underlying purposes of the exemption. And on that approach, there is no logical difficulty, on the facts supposed, in treating the incidental in-seasonal repackaging as a part of "first processing" even though the post-seasonal repackaging is not.

Alternatively, even if the in-seasonal repackaging were not itself to be deemed a part of "first processing", it could be said that it is a merely incidental activity that should not defeat the exemptions which would otherwise be available. That is, during the season Oregon is undeniably *primarily* engaged in first processing, and its concurrent performance of incidental repackaging means at most only that it is not engaged *exclusively* in first processing. It is true that normally an employer must be engaged virtually exclusively in first processing to qualify for the exemptions (unless the several activities are separable so that the exemptions can be separately applied). That principle, however, is not a rigid one and does not mean that any non-qualifying activity, no matter how *de minimis* in relation to the qualifying activities, necessarily bars the exemptions. And, in determining how substantial the "side" activities must be to defeat the exemptions, the test should be a qualitative as well as a quantitative one. That is, not only the extent of the activities, but also such factors as the reasons for their being performed and the effect of their performance on the use of overtime, should be taken into account. On the facts supposed, where the in-seasonal repackaging is done only to make use of otherwise idle labor and does not increase or affect

the use of overtime, even a relatively substantial amount of incidental repackaging during the season might not warrant denial of the exemptions.

Both of the foregoing bases for allowing the exemptions in the circumstances supposed rest on considerations that are peculiar to repackaging that is incidental to the concurrent processing of fresh vegetables being received during the harvest season. Whichever formulation should be finally adopted by the Administrator, therefore, would not affect the sole question in issue here—*i.e.*, Oregon's right to the exemptions when, after the season ends, it is engaged exclusively in the repackaging of bulk-stored vegetables and is employing overtime solely for that purpose.

III

Question: If the petitioner's position in this respect is reflected or clarified in any administrative rulings, will you please submit same.

As stated in our main brief, the regulations and rulings leave no doubt of the Administrator's position that repackaging by itself (*e.g.*, where, as in the case of Oregon's post-seasonal repackaging, it is the sole operation being carried on) is not exempt as first processing.[6] On the quite different question posed by the Court, however—the effect of repacking performed during the season incidental to the concurrent processing of fresh vegetables—the Adminis-

[6] Pet. Br. 22-23. See also Interpretive Bulletin No. 14 (1940), 35 W.H.M. 351, 359, stating that "repacking or recanning fruits and vegetables" are not exempt operations because "they are not performed on fresh fruits or vegetables."

trator has not, as we have noted, had occasion to adopt a formal position. The informal views on that question stated above are not, therefore, reflected in any administrative rulings.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959